Supreme Court, U.S.
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No. 91-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL ADVERTISING COMPANY,
Petitioner

vs.

CITY OF RALEIGH, NORTH CAROLINA,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

Brief Of Defenders Property Rights Joined By Citizens For Constitutional Property Rights, Environmental Conservation Oganization, Fairness To Land Owners Committee, Land Improvement Contractors Association, North Carolina Land-owners Association, Outdoor Advertising Association Of America, Inc., Property Rights as *Amici Curiae* Alliance And Virginians For Property Rights In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Question Presented

1. Whether it is constitutionally permissible for a claim for just compensation which is based on the Fifth Amendment of the United States Constitution to be extinguished by a state statutory time limitation?

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Interests of *Amici Curiae*

Amici Curiae **Defenders of Property Rights** is a not-for-profit public interest law foundation whose members are property owners and other beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest and the private property rights of its membership. Defenders of Property Rights engages in litigation around the nation on behalf of its membership in defense of property interests protected against government incursion by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory takings issues.

Citizens for Constitutional Property Rights is a Florida-based state-wide group which has as its mission the goal of securing strong private property rights guaranteed by the Bill of Rights. This organization is active with respect to public advocacy and awareness of governmental programs and regulations which have the effect of eroding private property in violation of the Constitution.

The **Environmental Conservation Organization (ECO)** is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality premised on vigorous constitutionally-protected property rights. Currently there are close to 7 million individuals affiliated with ECO.

The **Fairness to Land Owners Committee (FLOC)** is a national organization with over 9,000 members in 32 states. FLOC is dedicated to the preservation of constitutionally-protected private property rights, including the right to use private property prudently. FLOC is dedicated to the advocacy for and the education of the principles of conservation versus confiscation of private property without just compensation.

The **Land Improvement Contractors Association** is a 40-year old organization of building and construction contractors whose industry is dramatically affected by zoning and land use regulations. The Association has been active at the local and national levels on behalf of its members in opposing unnecessary and excessively burdensome restrictions upon the use of private property.

The **North Carolina Landowners Association** is a North Carolina based organization representing up to 150,000 individuals whose private property rights will be directly affected by the outcome of this case. The NCLA was founded to inform and educate private property owners about governmental regulations that unconstitutionally restrict private property rights in North Carolina.

The **Outdoor Advertising Association of America, Inc. (OAAA)** is a national organization comprised of billboard and outdoor sign owners. Outdoor advertising is pervasively regulated through the zoning process and by other mechanisms at the national, state and local levels. These regulations are often confiscatory and bear scrutiny under the just compensation clause of the Fifth Amendment. Members of OAAA are currently involved in at least five cases in federal courts with issues similar to the issues raised in this case. OAAA has been active for many years in the courts, before Congress and in state legislatures in defense of the property rights of its members.

The **Property Rights Alliance** ia a Washington state-wide organization working to bring constitutionally-protected private property rights into the equation of land use regulations.

Virginians for Property Rights is a Virginia-based statewide organization comprised of grassroots property rights groups and individuals who are interested in the protection and preservation of constitutionally-protected private property rights. Their mission is to (1) educate the public regarding private property rights issues; (2) assist others in participating

in the legislative proces regarding property rights issues; and (3) participate in litigation on behalf of their membership in cases involving important property rights issues.

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Statement of the Case

Amici adopts the Statement of the Case as presented by the Petitioner, the National Advertising Company.

Summary of Argument

The just compensation clause contained in the Fifth Amendment to the United States Constitution provides a direct right of action. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Jacobs v. United States*, 290 U.S. 13 (1933). The Petitioner in this case filed a takings challenge to a city ordinance which it alleges took its private property in violation of the just compensation clause of the Fifth Amendment . The Petitioner sought relief for this alleged unconstitutional taking under the Civil Rights Act, 42 U.S.C. § 1983, and directly under the Fifth

Amendment. Both the district court and the Fourth Circuit Court of Appeals mistakenly treated the Fifth Amendment claim as a cause of action brought solely under § 1983. The courts therefore applied what they considered to an appropriate statute of limitations, namely a three- year period applicable to causes of action based upon "a liability created by statute." N.C.G.S. 1-52 (2). The First Amendment cause of action was not considered to be subject to the same statute of limitations, however, as the Fourth Circuit concluded that "an ordinance facially offensive to the First Amendment can[not] be insulated from challenge by a statutory limitations period." Petitioner's Appendix A-16.

This case offers an opportunity for this Court to determine whether the Fourth Circuit' s reasoning with respect to the First Amendment is applicable to the Fifth Amendment. There is, of course, nothing in the language of the just compensation clause itself which justifies any limitation on that right whatsoever. Moreover, in *Jacobs v. United States, supra,* this Court held that the right of action under the Fifth Amendment was not based on statute and could not therefore be qualified by statute.

This case raises the issue of whether a cause of action which is based on the Fifth Amendment and which depends upon no statutory authorization as its basis can be extinguished by a legislatively-created time bar. It furthermore presents the question that if the Constitution does permit such a limitation on the express constitutional right, what is the appropriate limitations period.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO DETERMINE WHAT, IF ANY, STATUTE OF LIMITATIONS APPLIES TO THE FIFTH AMENDMENT RIGHT TO JUST COMPENSATION FOR PROPERTY WHICH HAS BEEN TAKEN

This Court has never addressed the issue of whether claims for just compensation brought directly under the Fifth Amendment of the United States Constitution can be time-barred or if so, the appropriate statute of limitations.[1] This case affords that opportunity. It is the position of the *amici* that the government should not be allowed to avoid its constitutional obligation to pay just compensation for property which it has taken simply by placing a time limit upon the enforcement of that obligation. Nor should it be able to extinguish the right altogether by enacting a statute of limitations so short as to be meaningless.

The claim for just compensation in this case arises out of a challenge to a city ordinance that forces the removal of the 36 advertising billboards owned by the Petitioner. The Petitioner here asserts that the ordinance in question takes its property for public use and therefore that the Fifth Amendment of the United States Constitution requires that just compensation be paid. However, because the claim for compensation was characterized solely as an action under 42 U.S.C. § 1983, both the federal district court and the Fourth Circuit Court of Appeals held that the Fifth Amendment claim for just compensation was time-barred pursuant to North Carolina's three-year statute of limitations which applies to actions based upon "a liability

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[1] Certainly some challenges for just compensation can be subject to a statute of limitations. For example, under 28 U.S.C. § 2501, the Tucker Act sets a six-year statute of limitations for actions brought in the United States Claims Court for monetary claims against the United States government. A Tucker Act claim, however, is a statutory cause of action and is not founded directly on the Constitution.

created by statute." G.S.N.C. 1 - 52 (2), Petitioner' s Appendix C-4. The Fourth Circuit recognized the unacceptability of this analysis in the context of the First Amendment's claim and accordingly held that the petitioner's First Amendment cause of action was not time barred because "an ordinance facially offensive to the First Amendment can[not] be insulated from challenge by a statutory limitations period . . ." Petitioner's Appendix A-16.

While the Fourth Circuit may well be correct that the First Amendment should not be subject to a statutory limitations period, there is no decision by this Court which holds that a Fifth Amendment claim for just compensation brought directly under the Constitution should not also be exempt from a state statutory limitations period. This is particularly true where, as was the case here, the limitations period applied was for statutory causes of action.

There is, of course, no basis in the Fifth Amendment for holding that just compensation claims can be extinguished by a legislatively-created time bar. The Fifth Amendment of the United States Constitution contains no limitation or exception for its guarantee that when private property rights are taken for public use, just compensation must be paid to the owner:[2]

"[N]or shall private property be taken for public use, without just compensation." U.S.CONST. amend. V.

The obligation for just compensation simply attaches whenever government action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of

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[2] The just compensation clause contained in the Fifth Amendment is the only constitutional provision providing a monetary remedy. In this sense, it is unique.

just compensation to which he is entitled. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980) As Justice Brennan articulately explained in his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981): "This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." *Id.* at 654. Justice Brennan concluded his opinion with the further observation that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." *Id.* at 661 .

The most powerful analysis of the Fifth Amendment guarantee that an individuals's rights are protected from confiscation by the sovereign is contained in *Jacobs v. United States*, 290 U.S. 13 (1933). In *Jacobs*, the Court reviewed the constitutionality of a lower court's decision which held that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit was brought did not authorize the payment of interest. The *Jacobs* Court rejected the lower court's conclusion that one's constitutional right to just compensation could be limited by statute:

> "This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution.... The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.... The suits were ... founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive

> and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produced the full equivalent of that value paid contemporaneously with the taking.'"

Id. at 16-17 (citations omitted).

The *Jacobs* Court realized that to fulfill the constitutional promise of just compensation that right cannot be taken away or qualified by statutory whim. The *Jacobs* decision gives credence to the this constitutional guarantee considered essential "in a free government" wherein "almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." Story, J., *Commentary on the Constitution of the United States*, para. 1790 (1833).

This Court has in other contexts similarly rejected attempts to limit the right of just compensation contained in the Fifth Amendment. In *First English*, this Court flatly rejected the government's contention that the just compensation clause serves only as a limitation on the power of government to act and is not of itself a remedial provision: "The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.'" *Id.* at 316, n.9.

Also in *First English*, this Court overruled the California Supreme Court's prior line of holdings that disallowed damages prior to the actual invalidation of a challenged regulation. The Court reasoned much as did the Court in *Jacobs*, that denying an owner compensation for all those years in which he held the

property but was denied its full use would be a constitutionally-insufficient remedy:

> "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

Id. at 321.

Given the explicit nature of the just compensation clause itself and the long history of this Court's decisions which have maintained its vitality against attempts to limit it by governmental legislation or acts, it would seem anomalous to conclude that a cause of action can be extinguished on the basis of a statutory time limitation. This is not to say that statutes of limitations do not serve valid procedural interests in other contexts. Where the cause of action is created by statute, *e.g.*, 42 U.S.C. § 1983 (see, *e.g, Board of Regents v. Tomanio,* 446 U.S. 478 (1980)), or in instances involving a waiver of sovereign immunity, 28 U.S.C. § 2501 (six-year statute of limitations for actions brought against the United States government for claims of just compensation set forth in the Tucker Act)(see *Soriano v. United States,* 352 U.S. 270 (1957)) prudential concerns of screening out stale claims and putting a limit upon how long a defendant may be subject to a claim are legitimate. However, when a claim is based directly on an express provision of the Constitution, such limitations can only be viewed as substantive in effect because they extinguish both the right and the remedy for claims of just compensation.

Alternatively, if this Court were to conclude that a time bar is constitutionally permissible, this case also affords the opportunity to address the issue of what period of limitation should apply. Because the claims in this case were treated as being brought solely under 42 U.S.C. § 1983, the courts below used a state limitations period, namely a three-year limitation period

pursuant to G.S.N.C. 1-52 (2), the time limitation applicable to actions based upon "a liability created by statute." Petitioner's Appendix C-4. However, where a claim for just compensation is based directly on the Constitution and not any state statutory provision, the more apposite statute of limitations may be the six-year statute of limitations contained in the Tucker Act, 28 U.C.C. § 2501. The one thing that is clear is that the appropriate limitations period is not one based on state statutory causes of action. Moreover, since causes of action based on a Bill of Rights apply uniformly to protect all citizens, it would be an anathema to allow different states to qualify this federal constitutional right by limiting it differently through state legislation. Indeed, since claims for just compensation are always against the same defendant, *i.e.*, the government, a statute of limitations, if any, should be uniform.[3]

CONCLUSION

Since the question of the appropriate statute of limitations has never before been decided by this Court, and since it is an issue critical to Fifth Amendment litigation, this Court should therefore grant *certiorari* to review this important issue.

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[3] In contrast, Section 1983 causes of actions may be brought against individuals and considerations as to them may be different from those applying to the government.